

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

ABENAMAR ZAPATA PONCE,

Appellant.

No. 37907-4-II

UNPUBLISHED OPINION

Houghton, P.J. — Abenamar Zapata Ponce appeals the sentence imposed on his convictions of first degree child molestation, four counts of felony indecent exposure with sexual motivation, and misdemeanor stalking, arguing various grounds.<sup>1</sup> The State correctly concedes error as to the 24-months' supervision on the misdemeanor stalking conviction. The 24-months' supervision for the misdemeanor stalking conviction is vacated and otherwise the sentence imposed is affirmed.

**FACTS**

The victim of these crimes was V.M., whose father was related to Ponce. Ponce lived with V.M.'s family for approximately two years when V.M. was 10 and 11 years old. During that

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<sup>1</sup> A commissioner of this court considered the matter pursuant to RAP 18.14 and referred it to a panel of judges.

period, he came and went as he chose, generally spending a few nights a week in the apartment and sometimes staying elsewhere.

V.M. testified that sometime after Ponce started staying with her family, he began following her to school. One afternoon while she was watching television, Ponce came and sat beside her. He placed his hand on her thigh and then moved it to her crotch. She got up and left the room. She did not report this conduct to her parents because she was afraid of Ponce. But sometime thereafter, when he hugged and kissed her, she did tell her parents, and her father told Ponce to leave the apartment and not come back.

After Ponce moved out, on at least four occasions, he waited by the apartment Dumpster. He stood there with his pants down, masturbating, and called to V.M. as she passed on her way to and from the school bus stop. Ultimately, V.M. reported this behavior to her school counselor, also mentioning the incident on the couch. The counselor gave the information to the Vancouver police.

The State charged Ponce with first degree child molestation, felony indecent exposure with sexual motivation, and misdemeanor stalking. A judge heard the matter and found him guilty on all charges.

The trial court imposed an exceptional sentence of 240 months for the child molestation, 42 months above the high end of the standard range. It imposed 60 months for each of the indecent exposure convictions, within the standard range for those crimes, and 365 days for the misdemeanor stalking, with all of the time running concurrently. The trial court also entered a no-contact order, prohibiting him from any contact with V.M. for the rest of his life. In his appeal, he

does not contest his convictions, but he asserts several errors with regard to his sentence.

### ANALYSIS

Ponce first challenges the exceptional sentence for the molestation conviction. He contends that insufficient evidence supported the trial court's finding that he abused a position of trust in committing the crime.

A position of trust is established where there is a family relationship between the victim and the perpetrator. *State v. Garnica*, 105 Wn. App. 762, 772, 20 P.3d 1069 (2001); *State v. Bedker*, 74 Wn. App. 87, 95-96, 871 P.2d 673 (1994). The evidence supported such a finding here. Ponce lived with V.M.'s family for approximately two years, and he was treated as a member of the household. V.M.'s parents testified that they were not concerned about leaving him alone with the children, and Ponce himself testified that he sometimes babysat for them. His position in the family gave him easy access to V.M. His presence also made reporting his conduct more difficult. Ample evidence supported the aggravating factor.

Ponce next challenges the lifetime no-contact order. The maximum term that a court may impose for a no-contact order is the statutory maximum sentence for the crime. *See State v. Armendariz*, 160 Wn.2d 106, 118-20, 156 P.3d 201 (2007). Ponce concedes that the no-contact order was proper as to his molestation conviction, but he asserts that the trial court erred in making it applicable to the other sentences. The no-contact provision for the misdemeanor stalking sentence is 24 months. The no-contact for life provision is included at paragraph 4.3 of the felony judgment and sentence, without reference to any particular crime.

Ponce has not challenged his convictions, and the molestation conviction has a statutory

maximum sentence of life. There is no scenario under which the duration of the no-contact order would be reduced. The ambiguity, if error, is harmless. *See State v. Stevens*, 58 Wn. App. 478, 502, 794 P.2d 38 (1990).

Finally, Ponce challenges the imposition of 24 months of supervision regarding his misdemeanor stalking conviction. The State correctly concedes error. The trial court imposed the maximum 365-day sentence. It purported to suspend that sentence, but also it indicated that he was given credit for 365 days already served. As he has served the entire possible sentence, the imposition of probation is not authorized. RCW 9.95.210(1).

The 24 months for the misdemeanor stalking conviction is vacated and otherwise the sentence imposed is affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, P.J.

We concur:

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Bridgewater, J.

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Hunt, J.